In short, what matters under this Court's decisions is whether each provision at issue (as applied) falls inside or outside the specific category the AEA walls off to States—a category limited to regulating nuclear safety, and *excluding* not only provision of compensation, or even punitive damages, for harms caused even by nuclear safety deficiencies, but regulation of the whole range of economic and other matters besides nuclear safety. Under that standard, the laws at issue here, in what they actually do (and in what interests they serve), all pass muster. Although the Government suggests otherwise (SG Br. 13), the petition identifies legitimate interests served by many of the Utah laws that the Tenth Circuit invalidated without individual examination. Pet. 24-27. Importantly, those interests must be taken at face value here: respondents brought only a pre-application facial challenge, asserted only field, not conflict, preemption, and submitted no evidence whatever to establish a conflict with particular NRC or other federal policies. The Government's allusions to such particular federal decisions or policies (SG Br. 14, 15), and bare assertions about the laws' impacts, are simply misplaced in this case at this time.

For example, as to Utah's county planning laws, nothing in the AEA forbids States to impose informational requirements, including those about nuclear hazards, so that people can make informed decisions about, say, whether to move out of the area; nor are States barred from pursuing land use and environmental interests. And it is hard to imagine why the AEA would bar a State from charging one of its own internal governmental subdivisions with making plans to protect its citizens (*contra* SG Br. 16-17). (As to the municipal-services provision, see note 2, *supra*.) The several provisions governing liability serve the interest, clearly preserved to the States under *Silkwood*, of ensuring payment for harms that the facility may cause, including (but not only) those from radiation hazards. Particular bonding or fee requirements that are part of the state licensing process likewise address costs imposed by

the project (without a factual record, there cannot be a question of excessiveness here), and other licensing requirements clearly address various informational and other non-nuclear-safety interests. Finally, the provisions merely re-assigning authority over particular roads serve the obviously legitimate interest in ensuring that decisions are made at a high enough government level to reflect all the interests affected by this project, economic and otherwise, which extend well beyond a particular county. *See* Pet. 24-27.

Once the Government's incorrect "targeting" position is put aside, it lacks any answer to the facial sufficiency of these interests. SG Br. 13-17. Any challenges, therefore, must await application of the laws and development of a factual record. The Tenth Circuit's contrary decision dramatically lowers ripeness and facial-challenge thresholds for federal-court action and vastly expands AEA preemption. The decision should be reviewed and reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK L. SHURTLEFF
Attorney General
FRED G NELSON
DENISE CHANCELLOR
Assistant Attorneys General
160 East 300 South, 5th Floor
Salt Lake City, UT 84114-0873
(801) 366-0285

RICHARD G. TARANTO
Counsel of Record
FARR & TARANTO
1220 19th Street, NW
Washington, DC 20036
(202) 775-0184

November 14, 2005

NOV 4 - 2005

No. 04-575

In the Supreme Court of the United States

DIANNE R. NIELSON, EXECUTIVE DIRECTOR, UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY, ET AL., PETITIONERS

v.

PRIVATE FUEL STORAGE, L.L.C., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PAUL D. CLEMENT
Solicitor General
Counsel of Record
KELLY A. JOHNSON
Acting Assistant Attorney General
THOMAS G. HUNGAR
Deputy Solicitor General
LISA S. BLATT
Assistant to the Solicitor General
GREER S. GOLDMAN
RONALD M. SPRITZER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

KAREN D. CYR
General Counsel
JOHN F. CORDES, JR.
Solicitor
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

QUESTIONS PRESENTED

1. Whether a challenge to Utah's scheme for the regulation of a privately developed spent nuclear fuel storage facility was ripe for judicial review.

2. Whether Utah's scheme is preempted by the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*

TABLE OF CONTENTS

Page

Statement 1
Discussion 6
A. The ripeness question does not merit review 6
B. The court of appeals' application of field preemption principles to the circumstances of this case does not merit review 10
Conclusion 19

TABLE OF AUTHORITIES

Cases:

Abbott Labs. v. *Gardner*, 387 U.S. 136 (1967) 7
Baltimore & Ohio R.R. v. *Oberly*, 837 F.2d 108 (3d Cir. 1988) 12
Bullcreek v. *NRC*, 359 F.3d 536 (D.C. Cir. 2004) 2
California Coastal Comm'n v. *Granite Rock Co.*, 480 U.S. 572 (1987) 11, 12
Chemical Specialties Mfrs. Ass'n v. *Allenby*, 958 F.2d 941 (9th Cir.), cert. denied, 506 U.S. 825 (1992) 12
Citizens for an Orderly Energy Policy, Inc. v. *County of Suffolk*:
813 F.2d 570 (2d Cir. 1987) 18
604 F. Supp. 1084 (E.D.N.Y. 1985), aff'd, 813 F.2d 570 (2d Cir. 1987) 18
English v. *General Elec. Co.*, 496 U.S. 72 (1990) 2, 11, 12, 14

Cases—Continued: Page

Esso Standard Oil Co. v. *Department of Consumer Affairs*, 793 F.2d 431 (1st Cir. 1986) 12

Gade v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992) 13

Kerr-McGee Chem. Corp. v. *City of W. Chicago*, 914 F.2d 820 (7th Cir. 1990) 17, 18

Long Island Lighting Co., 21 N.R.C. 644 (1985) 18, 19

National Park Hospitality Ass'n v. *Department of the Interior*, 538 U.S. 803 (2003) 9

Natural Res. Def. Council v. *Houston*, 146 F.3d 1118 (9th Cir. 1998), cert. denied, 526 U.S. 1111 (1999) 12

Nuclear Energy Inst., Inc. v. *EPA*, 373 F.3d 1251 (D.C. Cir. 2004) 2, 3

Ohio Forestry Ass'n v. *Sierra Club*, 523 U.S. 726 (1998) 9, 10

Pacific Gas & Elec. Co. v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) ..... *passim*

Pentel v. *City of Mendota Heights*, 13 F.3d 1261 (8th Cir. 1994) 12

Pharmaceutical Research & Mfrs. of Am. v. *Concannon*, 249 F.3d 66 (1st Cir. 2001), aff'd, 538 U.S. 644 (2003) 12

Cases—Continued: Page

Private Fuel Storage, L.L.C.:
56 N.R.C. 169 (2002) 8
59 N.R.C. 31 (2004) 8
No. 72-22-ISFSI (CCI-05-19) (NRC Sept. 9, 2005) 6
Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) 11
Silkwood v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984) 2, 14, 15, 16
Texas v. *United States*, 523 U.S. 296 (1998) 7, 8

Constitution, statutes and regulation:

U.S. Const. Art. I, § 8, Cl. 3 (Commerce Clause) 5
Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.* 1, 2, 6, 11, 16, 18
42 U.S.C. 2021(k) 2, 12
Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.* 9
Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101 *et seq.* 2
Price-Anderson Act, 42 U.S.C. 2210 15
42 U.S.C. 2210(a) 16
Radiation Control Act, Utah Code Ann §§ 19-3-101 *et seq.* (2003):
§§ 19-3-301 *et seq.* (Pt. 3) 3, 4
§ 19-3-301(2)-(4) 3
§ 19-3-301(5)(a) 4
§ 19-3-304 3
§§ 19-3-304 to 19-3-307 3
§ 19-3-305 ..... 3, 4, 14
§ 19-3-305(1) 14

Statutes and regulation—Continued: Page

§ 19-3-305(4) 14
§ 19-3-305(10) 14
§ 19-3-305(12) 14
§ 19-3-305(14) 14
§ 19-3-306 3
§ 19-3-306(3) 4
§ 19-3-306(10) 4
§ 19-3-308(1)(a) 4
§ 19-3-308(1)(b) 4
§ 19-3-318 4
§ 19-3-318(2)(b) 16
§ 19-3-319(3)(a) 4

Utah Code Ann.:

§ 17-27-301 (Supp. 2004) 5
§ 17-27-301(3)(a)(i) (Supp. 2004) 14
§ 17-27-301(3)(a)(iii) (Supp. 2004) 5, 17
§ 17-34-1(3) (Supp. 2004) 5
§ 54-4-15 (2000) 5
§ 54-4-15(4)(b) (2000) 6
§ 72-3-301 (2001) 5
§ 72-4-125(4) (2001) 5
§ 78-34-6(5) (2002) 5

10 C.F.R. Pt. 72 ..... 2, 4

In the Supreme Court of the United States

No. 04-575

DIANNE R. NIELSON, EXECUTIVE DIRECTOR, UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY, ET AL., PETITIONERS

v.

PRIVATE FUEL STORAGE, L.L.C., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

Following a publicly-announced proposal by respondents, a private consortium of electric utilities and an Indian tribe, to develop a storage facility for spent nuclear fuel on Indian land in the State of Utah, the State enacted a series of comprehensive and interrelated statutes to ban or limit the storage and transportation of spent nuclear fuel. The Tenth Circuit held that respondents' challenge to those statutes was ripe for review and that most of the statutory provisions were preempted by the Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 *et seq.* Those

rulings are correct and do not warrant further review by this Court.

1. In the AEA, Congress vested the Nuclear Regulatory Commission (NRC) with "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials. Upon these subjects, no role was left for the states." *Pacific Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 207 (1983) (citations omitted); *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 249-250 (1984). The AEA also preempts state laws that have a purpose to address "protection against radiation hazards," 42 U.S.C. 2021(k), or that have a "direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." *English* v. *General Elec. Co.*, 496 U.S. 72, 85 (1990).

Spent nuclear fuel (SNF), which is highly radioactive, must periodically be removed from commercial nuclear reactors. *Pacific Gas*, 461 U.S. at 195-196. "While the AEA does not specifically refer to the storage or disposal of spent nuclear fuel, it has long been recognized that the AEA confers on the NRC authority to license and regulate the storage and disposal of such fuel." *Bullcreek* v. *NRC*, 359 F.3d 536, 538 (D.C. Cir. 2004). Pursuant to the AEA, the NRC has promulgated regulations providing a comprehensive procedure for the licensing of *temporary* SNF storage installations in order to ensure safe storage of the material. 10 C.F.R. Pt. 72. Congress addressed the *permanent* disposal of SNF (as well as high level radioactive waste) in the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101 *et seq.*, which provides for the study and eventual development of a permanent geologic repository. *Nuclear Energy Inst., Inc.* v. *EPA*, 373 F.3d 1251, 1258-1262 (D.C. Cir. 2004).

"As of 2003, nuclear reactors in the United States had generated approximately 49,000 metric tons of spent nuclear fuel. Most of this waste is currently stored at reactor sites across the

country. * * * By the year 2035, the United States will have produced 105,000 metric tons of nuclear waste—approximately twice the current inventory." *Nuclear Energy Inst.* v. *EPA*, 373 F.3d at 1258 (citations omitted). Facilities for the storage and disposal of SNF are therefore essential to sustain the viability of nuclear power as an energy source. *Pacific Gas*, 461 U.S. at 195-196 & n.2.

Since 1997, respondent Private Fuel Storage (PFS) has sought a license from the NRC to build and operate a temporary SNF storage facility on Utah land belonging to respondent the Skull Valley Band of Goshute Indians that is located southeast of Salt Lake City. Pet. App. 4a, 56a. The proposed facility would provide storage capacity for utilities that seek offsite storage of the SNF, until such time as the permanent geologic repository is operational. Expressing specific concern about the safety of PFS's efforts, Utah passed a series of statutes between 1998 and 2001 that the courts below found were designed to block the proposed facility. *Id.* at 5a, 37a, 47a, 49a-50a, 52a, 56a-57a, 63a. They are summarized briefly below.

a. *Utah's Licensing Regulations.* Part 3 of Utah's Radiation Control Act requires a SNF storage facility that has been licensed by the NRC also to obtain a state license for construction and operation. Utah Code Ann. § 19-3-304. The licensing scheme requires extensive analysis of health and safety issues related to the storage of SNF. *Id.* §§ 19-3-301(2)-(4), 19-3-304 to 19-3-307. The applicant also must provide Utah's Department of Environmental Quality (DEQ) with extensive information related to health and safety aspects of the proposed installation. *Id.* § 19-3-305. The license may not be issued unless DEQ finds the information in the application sufficient to support a variety of specific findings related to the health and safety effects of the facility. *Id.* § 19-3-306. The applicant must satisfy DEQ, for example, that "the wastes will not cause or contribute to an increase in mortality, an increase in illness, or pose a pres-

ent or potential hazard to human health or the environment." *Id.* § 19-3-306(3). The applicant must also provide information on topics such as groundwater, security plans, quality assurance programs, radiation safety programs, and emergency plans. *Id.* § 19-3-305. All of those areas are regulated by the NRC under 10 C.F.R Part 72 in order to protect human health and safety and the environment.

Part 3 also imposes substantial application and licensing fees. The applicant must pay a non-refundable "initial fee" of $5 million and thereafter "shall * * * pay an additional fee to cover the costs to the state associated with review of the application, including costs to the state and the state's contractors for permitting, technical, administrative, legal, safety, and emergency response reviews, planning, training, infrastructure, and other impact analyses, studies, and services required to evaluate a proposed facility." Utah Code Ann. § 19-3-308(1)(a) and (b). The applicant must also post a bond of "*at least*" $2 billion, or "a greater amount as determined * * * to be necessary to adequately respond to," among other things, "any reasonably foreseeable releases." *Id.* § 19-3-306(10) (emphasis added).

b. *Unfunded liability payment.* Part 3 further requires the operator of an SNF storage facility to pay to the State an amount equal to 75% of the "unfunded potential liability" of the project. Utah Code Ann. § 19-3-319(3)(a). That amount will be determined by DEQ based upon the health and economic costs expected to result from "a reasonably foreseeable accidental release" of SNF. *Id.* § 19-3-301(5)(a). Under those provisions, the DEQ may require payment of an additional amount above the level of insurance that the NRC decides to require in the project license. Pet. App. 44a-45a.

c. *Revocation of limited liability.* Part 3 also revokes statutory and common-law limited liability for officers, directors, and equity-interest owners of companies operating SNF storage facilities in Utah. Utah Code Ann. § 19-3-318.

d. *County planning requirements and the prohibition on providing municipal services.* Utah's legislation also includes county planning requirements. Pet. App. 36a, 75a. Among other things, county governments must either ban the storage and transportation of SNF, or adopt a comprehensive land use plan containing detailed information regarding the effects of any proposed SNF site upon public health and welfare. Utah Code Ann. § 17-27-301. The plan also must include "specific measures to mitigate the effects of high-level nuclear waste and greater than Class C radioactive waste and guarantee the health and safety of the citizens of the state." *Id.* § 17-27-301(3)(a)(iii). In addition, a county "may not provide, contract to provide, or agree in any manner to provide municipal-type services * * * to any area under consideration for a storage facility or transfer facility for placement of high-level nuclear waste, or greater than Class C radioactive waste." *Id.* § 17-34-1(3).

e. *Transportation provisions.* Utah also enacted provisions related to roads and railroad crossings that may be needed for access to an SNF storage facility in Utah. Utah Code Ann. §§ 54-4-15, 72-3-301, 72-4-125(4), 78-34-6(5); Pet. App. 8a-9a. One of the provisions divests the county of control over the only road providing access to PFS's proposed SNF storage facility, by designating the road a state highway. Utah Code Ann. § 72-4-125(4); Pet. App. 8a. Another provision requires that, before a disputed petition for a railroad crossing filed by an entity engaged in SNF storage may be resolved, the Governor and the state legislature must concur in the decision—a requirement that is imposed only on entities engaged in SNF storage. Utah Code Ann. § 54-4-15(4)(b); Pet. App. 8a.[1]

---

[1] Utah also passed certain provisions that require drug and alcohol testing of employees of companies engaged in SNF storage and authorize litigation to determine water rights in areas under consideration for SNF storage. The district court rejected respondents' Commerce Clause challenge to those provisions, Pet. App. 77a-80a, and that ruling was not appealed. *Id.* at 5a.